SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 1 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 123

MAURICE STEINGOLD, Executor of the Estate of SAMUEL A. STEINGOLD, deceased,

Petitioner,

—against—

CAPITAL AIRLINES, INC., UNITED AIRLINES, INC., VICKERS-ARMSTRONGS, INC., VICKERS-ARMSTRONGS (AIRCRAFT) LTD., Also known as VICKERS-ARMSTRONGS LTD., ROLLS-ROYCE, INC., and ROLLS-ROYCE, LTD.,

Respondents.

[PETITION No. 1]

ERNEST RASSNER, As Assignee of MAURICE STEINGOLD, Executor of the Estate of SAMUEL A. STEINGOLD, deceased,

Petitioner,

—against—

CAPITAL AIRLINES, INC., UNITED AIRLINES, INC., VICKERS-ARMSTRONGS, INC., VICKERS-ARMSTRONGS (AIRCRAFT) LTD., Also known as VICKERS-ARMSTRONGS LTD., ROLLS-ROYCE, INC., and ROLLS-ROYCE, LTD.,

Respondents.

[PETITION No. 2]

(Additional list of titles appears on reverse side of this cover)

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF KINGS

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MAURICE STEINGOLD, Executor of the Estate of SAMUEL A. STEINGOLD, deceased,

Petitioner,

—against—

CAPITAL AIRLINES, INC., and UNITED AIRLINES, INC.,

Respondents.

[PETITION No. 3]

MAURICE STEINGOLD, Executor of the Estate of SAMUEL A. STEINGOLD, deceased,

Petitioner,

—against—

VICKERS-ARMSTRONGS, INC.,

Respondent.

[PETITION No. 4]

MAURICE STEINGOLD, Executor of the Estate of SAMUEL A. STEINGOLD, deceased,

Petitioner,

—against—

VICKERS-ARMSTRONGS (AIRCRAFT) LTD.,

Respondent.

[PETITION No. 5]

MAURICE STEINGOLD, Executor of the Estate of SAMUEL A. STEINGOLD, deceased,

Petitioner,

—against—

ROLLS-ROYCE, INC.,

Respondent.

[PETITION No. 6]

MAURICE STEINGOLD, Executor of the Estate of SAMUEL A. STEINGOLD, deceased,

Petitioner,

—against—

ROLLS-ROYCE, LTD.,

Respondent.

[PETITION No. 7]

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Statutes Cited

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—against—

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Respondent.

[PETITION No. 7]

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF KINGS

To the Justices of the Supreme Court of the United States:

Petitioners pray that a writ of *certiorari* issue to the Supreme Court of the State of New York, County of Kings, to review the orders of the New York State Court of Appeals entered in the above entitled cases on February 20, 1964.

Opinions Below

The opinion of the Appellate Division of the Supreme Court of the State of New York for the Second Department is reported in 34 Misc. 2nd 33.

The opinions of the Supreme Court of the State of New York, County of Kings, are not yet officially reported.

Jurisdiction

The orders of the Court of Appeals of the State of New York were dated and entered February 20, 1964, and copies thereof (with notice of entry) were received by petitioners by mail on March 5, 1964.

Jurisdiction of this court to review the above orders by writ of *certiorari* is predicated on 28 USC 1257, subd. 3.

Questions Presented

1. Do the subject orders, of which review is sought herein, constitute deprivation of due process and denial of the equal protection of the law in violation of the mandate of the Fourteenth Amendment to the United States Constitution?

Laws Involved

1. United States Constitution, Fourteenth Amendment.

2. New York State Civil Practice Law and Rules, Sections 5513, 5514 and 5602.

Statement

Since the subject cases involve identical or closely related questions, a single petition for writ of *certiorari* is filed herein pursuant to Supreme Court Rule 23, subd. paragraph 5.

The subject cases are all part of one single litigation instituted by petitioner Maurice Steingold in the Supreme Court of the State of New York, County of Kings, against all the respondents herein as the defendants.

The causes of action pleaded by petitioner against respondents arose out of the crash of a commercial airliner carrying petitioner's decedent as a passenger for hire.

The crash occurred in Virginia. The decedent had been a resident of Virginia during his lifetime.

Petitioner, the executor of the decedent's estate, is a resident of Virginia and his appointment as executor was in the Circuit Court in the City of Norfolk, Virginia.

Th respondents are corporations of States other than New York State, respondents Rolls-Royce, Ltd. and Vickers-Armstrongs, Ltd., being incorporated in England, while the other corporations were duly licensed and authorized to do business in New York State as foreign corporations.

The British corporations denied petitioner's contentions that they are doing business in New York State through subsidiary corporations and sales agents. Respondent Rolls-Royce, Ltd., successfully resisted jurisdiction of a collateral suit in U. S. District Court in Virginia and jurisdiction over this respondent alien corporation cannot be obtained elsewhere.

Petitioner, after the litigation was commenced against respondents, assigned part of his claim to Ernest Rassner, a resident of New York State.

Petitioner's motion to join the assignee as a necessary and indispensable party was denied by the Supreme Court of the State of New York, County of Kings, which denial was affirmed by the Appellate Division of the Supreme Court for the State of New York, Second Department. Leave to appeal was denied by the said Appellate Division and an appeal taken as of right to the Court of Appeals of the State of New York was dismissed on the ground that an appeal as of right did not lie from the order of affirmance,

and petitioner's subsequent motion to the said Court of Appeals for leave to appeal was dismissed upon the ground that the motion was not timely made.

While the appeal was pending before the said Appellate Division, the assignee, Ernest Rassner, moved in the Appellate Division for leave to intervene, which motion was denied.

The assignee's motion to the Court of Appeals for leave to appeal was dismissed on the ground that the motion was not timely made.

Similarly, separate motions made by the respondents herein to dismiss the complaint and to vacate service of process were granted by the Supreme Court of the State of New York, County of Kings.

Petitioner appealed each such order to the Appellate Division of the Supreme Court of the State of New York for the Second Department.

The said Appellate Division affirmed in each case.

Petitioner's motions to the Appellate Division for leave to appeal to the New York State Court of Appeals were denied.

Pursuant to the provisions of Sections 5513, 5514 and 5602 of the Civil Practice Law and Rules of the State of New York (hereinafter CPLR), petitioner appealed as of right to the said Court of Appeals, which appeals were dismissed on the ground that appeals as of right did not lie from the subject orders of affirmance.

Pursuant to the provisions of the said sections 5513, 5514 and 5602, petitioner then moved before the Court of Appeals for leave to appeal from the said orders of affirmance.

These motions were dismissed on the ground that they were not made within the time required by statute, said statute being the said sections 5513, 5514 and 5602.

The said CPLR is a new body of law governing the practice and procedure in the Courts of the State of New York, which became effective and went into operation in September, 1963.

Section 5602 makes provision for appeals to the Court of Appeals by permission.

Section 5513 establishes the time requirements relating to appeals.

Section 5514 provides for alternative methods of appeal and extension of time to take appeals or to move for permission to appeal.

Section 5514 permits an appellant to move for permission to appeal if his appeal taken as of right is denied or dismissed.

This method of extending time for an appellant to use the alternative method of appeal, where his original method is dismissed or denied, is a new provision in the procedural law of the State of New York.

It clearly makes the petitioner's motions for leave to appeal to the Court of Appeals timely, since, in its provisions, petitioner's time for such motion was to be determined from the service upon petitioner of a copy of the order (with notice of entry) dismissing his appeal mistakenly taken as of right to the said Court of Appeals.

The purpose of the new provisions of section 5514 was to prevent an appellant from being penalized by having inadvertently adopted the wrong or erroneous route of appeal under the torturously complicated and complex rules governing the jurisdiction of the Court of Appeals that had been established over many years and by many decisions.

The New York State Legislature enacted section 5514 for the specific purpose of eliminating the injustice that resulted from litigants being barred from appeal by reason of having inadvertently chosen an appeal as of right where only an appeal by permission was permissible and vice versa.

Section 5514 was intended to eliminate the use of the complicated and complex jurisdictional requirements of the New York State Court of Appeals as a trap.

The federal question involved in the dismissal by the Court of Appeals of petitioner's motions for leave to appeal has not heretofore been raised, as the said dismissals were the last proceedings in the subject litigation.

Reasons for Granting the Writ

Newly enacted section 5514 was promulgated by the New York State Legislature to protect petitioner and all other appellants from adoption of an erroneous method of appeal.

The refusal of the Court of Appeals to allow petitioner the protection of this new statute denies petitioner the equal protection of the law and deprives him of due process, in violation of the mandate of the Fourteenth Amendment of the United States Constitution.

This presents a substantial question of tremendous importance to appealing litigants in the State of New York who are entitled to the protection of section 5514.

POINT I

The State Court's wrongful refusal to allow a litigant the benefit or protection of a State statute deprives the litigant of due process and denies him the equal protection of the law, in violation of the Fourteenth Amendment of the United States Constitution.

Petitioner's application to the Court of Appeals for leave to appeal, pursuant to the provisions of section 5514, was made within the time limitation, set forth in section 5513, of thirty days after service upon petitioner of a copy of the order (with notice of entry) dismissing the appeal taken as of right to the said Court of Appeals.

Respondents contended before the Court of Appeals, however, that the said motions for leave to appeal were not timely because they were not taken within thirty days after service of a copy of the order (with notice of entry) of the Appellate Division affirming the Supreme Court decisions dismissing the complaint and setting aside service of the process.

Despite the clear mandate of section 5514, allowing petitioner the protection of computing his time to appeal by leave on motion made within thirty days after service of an order (with notice of entry) dismissing or denying an erroneous method of appeal, the Court of Appeals dismissed petitioner's subject motions, thereby depriving petitioner of the benefits granted to him by the New York State Legislature in enacting section 5514.

The same Court of Appeals in *Morhous* v. *Supreme Court of New York*, 293 N. Y. 131, at page 134, proclaimed that a State can violate the mandate of the Fourteenth Amendment of the Constitution of the United States by the actions of its Courts, where the Court fails to accord an injured person the remedy to which he is entitled.

In *Irvin* v. *Dowd*, 359 U. S. 394, 404, 79 S. Ct. 825, 831, this Court held that:

> "'* * * the state courts, equally with the courts of the Union, * * * (have an obligation) to guard, enforce, and protect every right granted or secured by the Constitution of the United States * * *.' *Robb* v. *Connolly*, 111 U. S. 624, 637, 4 S. Ct. 544, 551, 28 L. Ed. 542."

Clearly, therefore, the Fourteenth Amendment mandate is violated by a Court of the State when it fails to accord to petitioner the protection and benefits of a statute to which petitioner is clearly entitled, which failure bars an allowable appeal by petitioner and, in effect, deprives petitioner of property without due process of law (his cause of action) and, equally as well, denies him the equal protection of the law.

Petitioner's causes of action, for breach of warranty, assault, wrongful death and conscious pain and suffering, are property rights which are protected by constitutional provisions. *Pritchard* v. *Norton*, 106 U. S. 124, 132, 1 S. Ct. 102; *Gibbes* v. *Zimmerman*, 290 U. S. 326, 332, 54 S. Ct. 140, 142.

CONCLUSION

Petitioner's right to due process is the right to have his day in Court and to be heard. *Truax* v. *Corrigan*, 257 U. S. 312, 42 S. Ct. 124.

Petitioner's day in Court includes the right to be heard in the Court of last resort on constitutional questions. *Aero Design* v. *Oklahoma*, 151 F. Supp. 844, affirmed 77 S. Ct. 824.

Wherefore, petitioner, reserving his right to litigate the federal constitutional questions in the Federal Courts, respectfully prays that the writ of certiorari issue to the Supreme Court of the State of New York, for the County

of Kings, to review the subject orders of the Court of Appeals of the State of New York, and petitioner further prays that, on the granting of the writ and on the hearing thereof, the orders of the New York State Court of Appeals dismissing petitioner's motions for leave to appeal be reversed and set aside and that the said motions for leave to appeal be determined in accordance with the provisions of section 5514 of the Civil Practice Law and Rules of the State of New York, and petitioner further prays for such other and further relief as may be just.

Respectfully submitted,

JACOB RASSNER,
Counsel for Petitioner.

APPENDIX A

Laws and Statutes

AMENDMENT XIV OF UNITED STATES CONSTITUTION, Section 1

"* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New York State Civil Practice Law and Rules: Sec. 5513

TIME TO TAKE APPEAL, CROSS-APPEAL OR MOVE FOR PERMISSION TO APPEAL

(a) TIME TO TAKE APPEAL AS OF RIGHT. An appeal as of right must be taken within thirty days after service upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has entered the judgment or order or served notice of its entry his appeal must be taken within thirty days after he did either.

(b) TIME TO TAKE CROSS-APPEAL. A party upon whom a notice of appeal is served must take an appeal within ten days after such service or within the time limited by subdivision (a), whichever is longer.

(c) TIME TO MOVE FOR PERMISSION TO APPEAL. The time within which a motion for permission to appeal must be made shall be computed from the date of service upon the party seeking permission of a copy of the judgment or order to be appealed from and written notice of its entry, or, where permission has already been denied by order of the court whose determination is sought to be reviewed, or a copy of such order and written notice of its entry,

except that when such party has entered such judgment or order or served notice of its entry the time shall be computed from the date that he did either. A motion for permission to appeal must be made within thirty days.

Sec. 5514

EXTENSION OF TIME TO TAKE APPEAL OR TO MOVE FOR PERMISSION TO APPEAL

(a) ALTERNATE METHOD APPEAL. If an appeal is taken or a motion for permission to appeal is made and such appeal is dismissed or motion is denied and, except for time limitations in section 5513, some other method of taking an appeal or of seeking permission to appeal is available, the time limited for such other method shall be computed from the dismissal or denial unless the court to which the appeal is sought to be taken orders otherwise.

* * *

Sec. 5602

APPEALS TO THE COURT OF APPEALS BY PERMISSION

(a) PERMISSION OF APPELLATE DIVISION OR COURT OF APPEALS. An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application:

1. in an action originating in the supreme court, a county court, a surrogate's court, the court of claims or an administrative agency.

   (i) from an order of the appellate division which finally determines the action and which is not appealable as of right, or

(ii) from a final judgment of such court or final determination of such agency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601; and

2. in a proceeding instituted by or against one or more public officers or a board, commission or other body of public officers or a court or tribunal, from an order of the appellate division which does not finally determine such proceeding, except that the appellate division shall not grant permission to appeal from an order granting or affirming the granting of a new trial or hearing.

(b) PERMISSION OF APPELLATE DIVISION. An appeal may be taken to the court of appeals by permission of the appellate division:

1. from an order of the appellate division which does not finally determine an action, except an order described in paragraph two of subdivision (a) or subparagraph (iii) of paragraph two of subdivision (b) of this section or in subdivision (c) of section 5601;

2. in an action originating in a court other than the supreme court, a county court, a surrogate's court, the court of claims or an administrative agency,

(i) from an order of the appellate division which finally determines the action, and which is not appealable as of right pursuant to paragraph one of subdivision (b) of section 5601, or

(ii) from a final judgment of such court or a final determination of such agency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601, or

(iii) from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

APPENDIX B

Court of Appeals Order

STATE OF NEW YORK,
IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twentieth day of February A.D. 1964.

PRESENT,

HON. CHARLES S. DESMOND,
Chief Judge, presiding.

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2 Mo. No. 140 B

MAURICE STEINGOLD, Executor of the Estate of SAMUEL A. STEINGOLD, Deceased,
Appellant,

vs.

ROLLS-ROYCE, LIMITED,
Respondent,

and

CAPITAL AIRLINES, INC., *et al.*,
Defendants.

A motion having heretofore been made herein upon the part of the appellant for leave to appeal to the Court of Appeals from the order of the Appellate Division affirming

an order setting aside service of the summons and complaint, and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is dismissed upon the ground it was not made within the time required by statute.

[SEAL]

A copy

/s/ GEARON KIMBALL,
Deputy Clerk.

Note

The foregoing order of the Court of Appeals has been made and entered in each case.

APPENDIX C

Opinion in Appellate Division

No opinions were rendered in the Appellate Division except the following concurring memorandum of Presiding Justice Beldock, Appellate Division, Second Department:

"In my opinion: (1) a cause of action for wrongful death is not a cause of action for 'personal injury' (General Construction Law, Sec. 37-a); (2) only a cause of action for 'personal injury' is not assignable (Personal Property Law, Sec. 41, subd. 1); (3) a cause of action for wrongful death is a cause of action for injury to *property* (*Matter of Meekin* v. *Brooklyn Hgts. R. R. Co.*, 164 N. Y. 145; (4) therefore, a cause of action for wrongful death is assignable. (See, also, *Matter of Fahys*, 18 F. Supp. 529.) However, I concur in the result because: (a) the assignment (a copy of which appears in the papers on the assignee's motion to intervene on this appeal, which we denied on March 25, 1963) is to an attorney of the 'right to sue' and not of the cause of action itself; (b) if it were an assignment of the cause of action, the assignment being to an attorney, would be void under Section 274 of the Penal Law, even if it was without consideration; and (c) if the assignee received a naked assignment of only the privilege to sue as plaintiff in lieu of the nonresident assignor, the assignee is not the real party in interest (*Brodner* v. *Brasselle*, 7 Misc. 2d 13)."

APPENDIX D

Opinions in Supreme Court

By Mr. Justice DiGiovanna

Steingold v. Capital Airlines, Inc.—This is a motion to quash service of process and dismiss the complaint against the defendant Rolls-Royce, Inc., on the ground that the court lacks jurisdiction over the subject matter of this action or on the alternative ground that the court should exercise its discretion to quash service and dismiss the complaint because this action should not have been brought in a New York State court.

This action is a wrongful death action. The decedent was killed in an airplane crash near Charles City in the State of Virginia on January 18, 1960. The plaintiff is a resident of the State of Virginia. He obtained letters testamentary from the Circuit Court for the City of Norfolk, Virginia, for the decedent who himself had been a resident of Virginia during his lifetime. Rolls-Royce, Inc., is a Delaware corporation which is registered to do business in the State of Virginia. The flight on which the decedent was killed was en route from Washington National Airport in Arlington, Virginia, to Norfolk, Virginia. The flight did not originate in, pass through nor was it destined for any point within the State of New York. At a hearing conducted by the Civil Aeronautics Board in Richmond, Virginia, of twenty-seven witnesses who testified, seventeen were Virginia residents, three were residents of England, two were residents of Maryland, two came from New York and one each from Connecticut and Michigan and one gave no address.

The action is apparently based upon the appropriate laws of the State of Virginia creating a cause of action for

wrongful death but the plaintiff seeks damages in excess of the maximum of $30,000 permitted under the Virginia wrongful death statute. Before commencing this action in New York State the plaintiff commenced an action in the United States District Court for the Eastern District of Virginia based precisely upon the same facts as those in this action. Process was served upon the same defendant on December 20, 1961. Another action has been commenced in the United States District Court for the Eastern District of Virginia by the administrator of Harold T. Geranson, also killed in that crash. He did not commence an action in this state. It appears affirmatively that the interests of justice would require that both actions be tried at the same time.

The complaint concerning the defendant movant alleges that it is a foreign corporation duly organized and existing under and by virtue of the laws of the State of Delaware and was licensed to do business on June 14, 1957, in the State of New York. In the memorandum objection is made that by having served a notice of special appearance under section 237a of the Civil Practice Act, the movant has waived its right to question the jurisdiction of this court to take cognizance of an action commenced as herein set forth.

This court is of the opinion that this action should be dismissed. This court is not bound to take cognizance of a tort action under the circumstances shown in this record. While the supplemental memorandum of the plaintiff stresses the fact that two witnesses resided in New York, it overlooks completely the absence of the other witnesses from this jurisdiction. This court is of the opinion that with the crowded condition of the courts of this state as a factor to be considered, the service of the summons should

be quashed and the action dismissed without prejudice to commencement of an action in the proper form. It is not a sufficient reason for this court to retain jurisdiction merely because the damages recoverable in New York may exceed that permitted in another state under its wrongful death actions. Motion is granted. Submit order.

Special Term, Part I—Steingold v. Capital Airlines, Inc.—This is a motion by Rolls-Royce, Ltd. The service of the summons was attempted to be made upon one Norman Miller, who it is claimed by the plaintiff, was an officer of Rolls-Royce, Ltd. The facts submitted in the affidavit of movant indicates clearly that Mr. Norman Miller had nothing to do with Rolls-Royce, Ltd., a British corporation, but that he was only an employee of Rolls-Royce, Inc., and had no authority to speak for Rolls-Royce, Ltd. Consequently the service of the summons under the circumstances upon him was improper. The purported service of the summons is vacated and set aside. Submit order.

Steingold v. Capital Airlines, Inc.—This is a motion by the defendants Capital and United to dismiss the complaint on the ground that the court has no jurisdiction of the person of the defendants nor of the subject of the action. It is based upon the same grounds that the decedent was a resident of the State of Virginia, the accident occurred in Virginia, the flight originated and ended in Virginia and had nothing to do with the State of New York. The reason why the summons was served upon the movants in New York was that they were doing business in the State of New York. That alone is not a sufficient reason for the courts of the State to entertain jurisdiction. The complaint is dismissed on the ground that the court has no jurisdiction of the subject matter of this action. Submit order.

Appendix D

Steingold v. Capital Airlines, Inc.—This is a motion to dismiss the action in so far as it related to the defendant Vickers-Armstrongs (Aircraft) Ltd., or in the alternative to set aside the service of the summons. As in one of the companion motions service was made upon Vickers-Armstrongs, Inc., and not under Vickers-Armstrongs (Aircraft) Ltd. The service of the summons is set aside and vacated. The action is dismissed. Submit order.

By Mr. Justice Brown:

Steingold v. Capital Airlines, Inc.—Motion by defendant Vickers-Armstrongs, Inc., under Rule 107 of the Rules of Civil Practice, for an order dismissing the complaint as against it on the ground that the court lacks jurisdiction over the subject matter of the action and that no sufficient reason exists for the exercise of jurisdiction by this court. The action is for wrongful death of plaintiff's testate, a resident of the State of Virginia, as a result of an airplane accident near Charles City, Virginia, on January 18, 1960. The flight originated in Chicago and was enroute from Washington, D. C. to Norfolk, Virginia, at the time of the crash. Neither the flight nor decedent had any contact with New York State. The moving defendant is a Delaware corporation with a certificate filed to do business in this state but it is claimed does not maintain an office here. At a hearing of the Civil Aeronautics Board conducted in Virginia seventeen of the witnesses were Virginia residents and only two were from New York. There is presently a suit based on the same wrongful death pending against all of the defendants in the United States District Court for the Eastern District of Virginia. The moving defendant has appeared and answered in that action and in this action. Another death action arising out of the same accident is also

pending in that court. Plaintiff does not dispute the foregoing facts excepting as to defendant's claim that it does not maintain an office in this state. The remaining defendants previously moved in this court to dismiss the complaint as to them on the same ground. The motion was granted (Steingold v. Capital Airlines, Inc. & c., 34 Misc. 2d 33).

The fact that it is here claimed that the moving defendant had an office in this state and that it has served an answer herein does not deprive the court of the right to exercise its discretion and refuse to entertain jurisdiction. The test is whether the circumstances of the case are of such special character as to warrant retention (Yesuvida v. Penn. R.R., 200 Misc. 815). Convenience "of the court, not that of the litigants, and practical considerations are the essential ingredients for the acceptance or the rejection of actions not otherwise mandated" (Williams v. Seaboard Air Line RR., 9 App. Div. 2d 268 and cases cited: cf. Winters, Jr. v. General Tire & Rubber Co., 13 App. Div. 2d 470). The fact that plaintiff seeks damages in excess of the maximum of $30,000 permitted under the Virginia wrongful death statute does not constitute such special circumstances. In Williams v. Seaboard Air Line Railroad (supra) the court pointed out that plaintiffs should not be encouraged to shop around for a foreign forum which they believe will be more favorable to them than the courts in their own state, saying "We do not believe that our judicial system will be improved by permitting suitors to transport their claims from place to place, absent special circumstances, and we are loath to approve the practice."

The convenience of seventeen Virginia prospective witnesses as against two New York prospective witnesses would be better served by a trial in Virginia. Furthermore,

another action is pending in that state by another Virginia resident against these defendants and that action might be consolidated, tried at the same time or immediately preceding the trial of this action thereby saving the time of litigants, witnesses and the court, without prejudice to the rights of the parties to the action.

Motion granted. Submit order."

Steingold v. Capital Airlines, Inc.—Cross Motion by Plaintiff for a reference to determine the fact of defendant Vickers-Armstrongs, Inc. doing business in this State is denied. In view of the determination made in the main motion decided simultaneously herewith. Submit Order.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. ~~1165~~ 133

MAURICE STEINGOLD, Executor of the Estate of SAMUEL A. STEINGOLD, deceased,

Petitioner,

against

ROLLS-ROYCE LIMITED, and ROLLS-ROYCE INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF KINGS

BRIEF FOR RESPONDENTS ROLLS-ROYCE LIMITED AND ROLLS-ROYCE INC. IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1963

No. 1165

MAURICE STEINGOLD, Executor of the Estate of SAMUEL A. STEINGOLD, deceased,

Petitioner,

against

ROLLS-ROYCE LIMITED, and ROLLS-ROYCE INC.,

Respondents.

BRIEF FOR RESPONDENTS ROLLS-ROYCE LIMITED AND ROLLS-ROYCE INC. IN OPPOSITION

Opinions Below

The opinions of the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department on the cases joined in this single petition are reported in 19 App. Div. 2d 752, 778; 242 N.Y.S. 2d 1018, 1020, and 1021.

The opinions of the Supreme Court of the State of New York, County of Kings, are reported at 34 Misc. 2d 33; 227 N.Y.S. 2d 639.

Jurisdiction

Petitioner asserts jurisdiction under 28 U.S.C. § 1257 (3).

Statement

On January 10, 1962 the Petitioner attempted to commence in the Supreme Court of the State of New York, County of Kings, against Respondent Rolls-Royce Limited, an English corporation, Respondent Rolls-Royce, Inc. and others, an action for wrongful death arising out of the crash of a commercial airliner in Virginia. Service of a copy of the summons and complaint was made on an employee of Rolls-Royce, Inc., a Delaware corporation. A special appearance was made under New York law by Rolls-Royce Limited to dismiss on the grounds of improper service and lack of personal jurisdiction over Respondent. Other defendants made similar motions as well as *forum non conveniens* motions.

Petitioner had previously instituted a collateral suit arising out of the identical air crash in the United States District Court in Virginia. Both actions are based upon the appropriate laws of Virginia creating a cause of action for wrongful death. Under the Virginia wrongful death statute and in the Virginia action, plaintiff is limited to a maximum of $30,000 in damages. In the New York action plaintiff sought damages in excess of $30,000. The flight on which plaintiff's decedent was a passenger was en route from Washington National Airport in Arlington, Virginia to Norfolk, Virginia and did not originate in, pass through nor was it destined for any point within the State of New York.

On March 29, 1962 all of the motions to dismiss the complaint and vacate the service of process were granted

by the Supreme Court of the State of New York, County of Kings. That court was of the opinion that the connection of the witnesses and the cause of action with the State of New York did not warrant its courts to take cognizance of a tort action under the above circumstances. The court also ruled that service of process upon an employee of Rolls-Royce, Inc. was ineffective to reach Rolls-Royce Limited.

The collateral suit in the United States District Court in Virginia is still pending. Contrary to the statement made by Petitioner (Petition, p. 5), no ruling has yet been made as to the amenability of Respondent Rolls-Royce Limited to the jurisdiction of the District Court in Virginia.

Petitioner appealed all of the orders of the Supreme Court, Kings County, to the Appellate Division, Second Department, of the Supreme Court of the State of New York. On July 10, 1963 said Appellate Division unanimously affirmed the lower court's decision. On October 27, 1963 the Petitioner moved in the Appellate Division, Second Department for leave to appeal to the New York Court of Appeals. This motion was unanimously denied.

On November 6, 1963 the Petitioner served a notice of appeal purportedly as of right to the New York Court of Appeals. On November 27, 1963 the Court of Appeals denied said motion on the ground of the non-finality of the orders below. Petitioner then had 30 days within which to move for permission to appeal in the Court of Appeals, to wit, December 27, 1963.

On January 10, 1964 Petitioner moved for permission to appeal to the Court of Appeals, which motion was denied on February 20, 1964 on the ground that it was not made within the time required by statute.

Argument

1. Petitioner is seeking a writ of *certiorari* to the wrong court. It is not appropriate for any writ of *certiorari* to issue to the Supreme Court of the State of New York, County of Kings, the lowest court which has made any determination herein. The outstanding reviewable order with respect to the motions made by Respondents Rolls-Royce Limited and Rolls-Royce, Inc. is that of the affirmance by the Appellate Division, Second Department. Under 28 U.S.C. § 1257 review by this Court may be granted from a judgment or decree of the highest court of a state in which a decision may be had. It is the Appellate Division, Second Department to which the Petition for *certiorari* should be directed. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157; *American Ry. Exp. Co.* v. *Levee*, 263 U. S. 19. Accordingly, the Petition herein to the Supreme Court of the State of New York, County of Kings, must be denied.

2. The Federal question allegedly involved herein, *i.e.*, the dismissal by the New York Court of Appeals of Petitioner's motions for leave to appeal has not in Petitioner's own words "heretofore been raised, as the said dismissals were the last proceedings in the subject litigation" (Petition, p. 7). The appropriate procedure herein was for Petitioner to raise said allegedly Federal question by a motion for a rehearing to the New York Court of Appeals in order to give that court an opportunity to rule upon any Federal question allegedly asserted. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673, 677-78. Petitioner did not do so and cannot raise any Federal questions for the first time in this Court.

3. Petitioner is complaining of an allegedly erroneous interpretation of Section 5514 of the New York Civil Practice Law and Rules by the New York Court of Appeals.

An erroneous interpretation of a procedural statute by a State court in no manner affords this Court grounds for the granting of *certiorari*.

Under frequently repeated holdings of this Court, it must accept the decision of the highest court of a state fixing the meaning of state legislation. *Supreme Lodge, Knights of Pythias* v. *Meyer*, 265 U. S. 30, 32; *International Harvester Co.* v. *Wisconsin Dept. of Taxation*, 322 U. S. 435, 445; *Winters* v. *New York*, 333 U. S. 507, 514; *Musser* v. *Utah*, 333 U. S. 95, 98; *Minnesota ex rel. Pearson* v. *Probate Court*, 309 U. S. 270, 273; *Hicklin* v. *Coney*, 290 U. S. 169, 172.

The Supreme Court will not accept *certiorari* to review and correct every alleged misstep of procedure in lower courts. It accepts the state court's construction and proceeds to test its validity on that basis. *Guaranty Trust Co.* v. *Blodgett*, 287 U. S. 509, 513; *Kingsley Pictures Corp.* v. *Regents*, 360 U. S. 684, 688.

Accepting the construction of CPLR § 5514 by the New York Court of Appeals, the said statute can in no manner be said to have violated any rights of Petitioner under the United States Constitution. No Federally protected right exists guaranteeing to a litigant the right to have an appeal heard by the highest court of a state. *National Union of Marine Cooks & Stewards* v. *Arnold*, 348 U. S. 37, 43; *McKane* v. *Durston*, 153 U. S. 684, 687-88. This is most certainly the case in a court of limited appellate review such as the New York Court of Appeals. New York Constitution, Article VI, § 7.

The appellate procedure provided by the New York statute is entirely permissive in nature and in no way grants litigants vested rights to pursue an appeal. *Szuchy* v. *Hillside Coal & Iron Co.*, 150 N. Y. 219. Petitioner himself failed to follow the requirements of the statute. Under any view of this record, Petitioner has not been denied any remedies which were not lost by his own dilatory actions.

Conclusion

The Petition for a Writ of *Certiorari* is directed to the wrong court, presents an allegedly Federal question never appropriately raised below, and presents no Federal grounds warranting the granting of *certiorari*. Accordingly, the Petition should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 133

MAURICE STEINGOLD, Executor of the Estate of
SAMUEL A. STEINGOLD, Deceased,

Petitioner,

—against—

Petition No. 6

ROLLS-ROYCE, INC.,

Respondent.

MAURICE STEINGOLD, Executor of the Estate of
SAMUEL A. STEINGOLD, Deceased,

Petitioner,

—against—

Petition No. 7

ROLLS-ROYCE, LTD.,

Respondent.

PETITIONERS' REPLY TO BRIEF FOR RESPONDENTS ROLLS-ROYCE, INC., AND ROLLS-ROYCE, LTD., (PETITIONS No. 6 and 7)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1165

MAURICE STEINGOLD, Executor of the Estate of SAMUEL A. STEINGOLD, Deceased,

Petitioner,

—against—

ROLLS-ROYCE, INC.,

Respondent.

[PETITION No. 6]

MAURICE STEINGOLD, Executor of the Estate of SAMUEL A. STEINGOLD, Deceased,

Petitioner,

—against—

ROLLS-ROYCE, LTD.,

Respondent.

[PETITION No. 7]

PETITIONERS' REPLY TO BRIEF FOR RESPONDENTS ROLLS-ROYCE, INC., AND ROLLS-ROYCE, LTD., (PETITIONS No. 6 and 7)

To the Justices of the Supreme Court of the United States:

Petitioner herewith replies to the brief (in opposition to petitions numbered 6 and 7) by respondents Rolls-Royce, Inc., and Rolls-Royce, Ltd.

Equitable Estoppel

Despite respondents' statement (p. 3) that no ruling has yet been made as to the amenability of Rolls-Royce, Ltd., to District Court jurisdiction in Virginia, it would appear respondent Rolls-Royce, Ltd., would be estopped, on equitable principles, from now taking a position contrary to its District Court position on that issue in this proceeding.

Error In Respondents' Statement

In total disregard of the clear provisions of CPLR 5513 and 5514 (see Pet. Appendix A, pp. 11-12), which allow petitioners 30 days time, after service of a copy of the subject orders with notice of entry, to move for leave to appeal to the Court of Appeals, respondents erroneously allege that petitioners' time expired on December 27, 1963 (p. 3).

CPLR 5513 provides that the 30 day period starts to run, not from the date of the order itself, but from the date of service of a copy of the order with notice of entry.

Similarly, CPLR 5514, sub-par. (a), which provides for an alternate method of appeal in the event an erroneous method is first selected, incorporates the time provisions of CPLR 5513, *i.e.* 30 days from service of a copy of the order with notice of entry.

Petitioners were Denied their Substantive Rights

Dismissal of petitioners' motion for leave to appeal on the ground of untimeliness when, in fact, the motion was timely, constituted a denial of the equal protection of the law and deprived petitioners of due process, the provisions of CPLR 5513 and 5514 being available to all litigants within the State of New York but having been denied to petitioners.

Respondents served their copies of the relevant orders with notice of entry on petitioners by mail, on December 13, 1963. The notices of entry are dated December 13, 1963[1], verifying mailing thereof no earlier than said date of December 13, 1963.

By virtue of the said provisions of CPLR 5513 and 5514, petitioners had 33 days from December 13, 1963 (3 additional days having been added to the 30 days, pursuant to New York Law, by reason of respondents effecting service by mail) to move for leave to appeal (*i.e.*, until January 15, 1964).

The subject motion for leave to appeal was made on January 10, 1964, as correctly stated in respondents' brief (page 3, last paragraph).

The subject motion, therefore, was clearly within time, and respondents' charge (page 5, last paragraph) that petitioners were dilatory is without foundation.

It is clear that respondents viewed CPLR 5513 and 5514 in the same manner as contended herein, otherwise their said service of notice of entry was meaningless and served no purpose. It is, and has been, traditionally used in New York practice to establish a cut-off date for time to appeal.

Review of Appellate Division Orders Has Not Been Sought

In addition to the errors hereinabove pointed out in respect to respondents' 'Statement', respondents erroneously argue, on page 4, that petitioners are seeking a writ of *certiorari* to the wrong court, contending that petitioners' writ should be directed to the Appellate Division, Second Department.

---

[1] See Appendix E *infra*, pp. 11-18 for subject orders with notice of entry served on petitioners.

This contention overlooks the prayer on page 2 of the petition "that a writ of *certiorari* issue * * * to review the orders of the New York State Court of Appeals entered in the above entitled cases on February 20, 1964.", as well as the "Conclusion".

The writ is not misdirected in this instance, as the record is in the custody of the Supreme Court of the State of New York, Kings County, although review is sought of the orders of the New York State Court of Appeals, petitioners having relied on the authority of *Dept. of Banking* v. *Pink*, 317 U. S. 264, 267.

Further, it appears that subject respondents misinterpret the purpose of the petition, which appears to be clearly and adequately set forth on page 7 of the petition under "Reasons For Granting The Writ", wherein it is clearly stated that the failure of the Court of Appeals to allow petitioners the benefit of the provisions of CPLR 5514 is the basis for requesting the writ.

This clearly does not involve a review of the decision of the Appellate Division.

It would appear, therefore, that, in view of what is set forth under "Reasons For Granting The Writ" and in the "Conclusion" to the petition (on pages 9 and 10 thereof), there is no basis for respondents' apparent confusion in contending that a review is sought of the Appellate Division orders and that the writ would be misdirected if directed to the Kings County Supreme Court.

Respondents Err on the Law

Respondents' brief proposes several erroneous concepts of constitutional law.

These concepts are erroneous and directly contrary to specific holdings of this Court, to wit:

A. Timeliness of Raising Federal Question

On page 4, respondents mistakenly rely on *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 677-8, for the erroneous contention that "Petitioner • • • cannot raise any Federal question for the first time in this Court.", when, to the contrary of respondents' contention, this Court held, in effect, in *Brinkerhoff-Faris* that a federal question is timely raised if raised at the first opportunity to do so (at p. 678).

See also *Am. Surety Co.* v. *Baldwin*, 287 U. S. 156, 164, 53 S. Ct. 98, 101, where, as here, the federal question was raised in this Court for the first time due to an unanticipated disposition below which threatened rights under the Federal Constitution.

B. Property Right in Cause of Action

On page 5, respondents erroneously contend that "An erroneous interpretation of a procedural statute by a State Court in no manner affords this Court grounds for the granting of certiorari.", thus completely overlooking the impact of the Fourteenth Amendment in protecting a litigant's property right in his cause of action (*Pritchard* v. *Norton*, 106 U. S. 124, 132, 1 S. Ct. 102; *Gibbes* v. *Zimmerman*, 290 U. S. 326, 332, 54 S. Ct. 140, 142), and the impact of the 'Full Faith and Credit Clause', where, as here, the cause of action arises under the laws of a sister State (*Hughes* v. *Fetter*, 341 U. S. 609, 611-2, 613, 71 S. Ct. 980, 982, 983; *Broderick* v. *Rosner*, 294 U. S. 629, 642, 55 S. Ct. 589, 592).

Further, in *Hanna* v. *Home Ins. Co.*, 281 F. 2d 298, 303 (5 Cir.), cert. den. 365 U. S. 838, rehearing denied, 366 U. S. 955, 81 S. Ct. 1905, it was clearly held that federal courts may review a state court's error if the error constitutes a deprivation of federal rights.

Respondents' erroneous contention in this regard is unequivocally refuted by an authority relied on by respondents, *Brinkerhoff-Faris Co.* v. *Hill, supra,* 281 U. S. 673, 679-680, 682.[2]

In further contending that this Court "must accept the decision of the highest Court of a State fixing the meaning of State legislation", respondents overlook the statement of this Court in *Musser* v. *State of Utah,* 333 U. S. 95, 68 S. Ct. 397 (relied on by respondents), that "we are not at liberty to disregard the explicit holding of the State Court as to the basis of its decision except for convincing reasons, * * *".

In addition to the fact that the State Court (New York State Court of Appeals) did not give its holding as to the basis for its decision, since the decision was without opin-

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[2] "Second. If the result above stated [deprivation of property by denial of remedy by state court] were attained by an exercise of the State's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious. *Ettor* v. *Tacoma,* 228 U. S. 148.[4] The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid (First National Bank of Greeley v. Weld County, 264 U. S. 450) state statute. The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government.[5]" (at pp. 679-680)

"* * * while it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.[9]" (at p. 682)

ion, it is further respectfully submitted that the convincing reasons which this Court requires to act herein are found in the protection guaranteed by the Fourteenth Amendment that petitioner's cause of action may not arbitrarily be interfered with, and the 'Full Faith and Credit Clause' requiring New York to honor the cause of action arising under Virginia law.

In this regard, New York law holds that a litigant's cause of action is a substantive right (*Lauterbach* v. *Fleischer*, 16 A. D. 2d 701, 227 N. Y. S. 2d 726, 727-8), and federal law holds that a cause of action is a property right which is protected by the due process provisions of the Fourteenth Amendment. (*Pritchard* v. *Norton, supra*, p. 5; *Gibbes* v. *Zimmerman, supra*, p. 5).

C. Respondents Becloud Real Question in Issue Herein

Respondents' further contention that "no federally protected right exists guaranteeing to a litigant the right to have an appeal heard by the highest court of the State", disregards the real question at issue herein.

The Fourteenth Amendment gives to this litigant the right to have his appeal on constitutional questions heard by the highest court of the State, as all other litigants are given such a right which has been denied to this litigant.

In further refutation of respondents' contention in this regard is *Aero Design & Eng. Co.* v. *Oklahoma Emp. S. Com'n*, 151 F. Supp. 844, aff'd 353 U. S. 943, 77 S. Ct. 824, which holds that petitioner's day in Court includes the right to be heard in the Court of last resort on constitutional questions.

There is no statement of authority in the case relied on by respondents, *Szuchy* v. *Hillside Coal & Iron Co.*, 150 N. Y. 219, to support respondents' contention that "the

appellate procedure provided by the New York statute * * * in no way grants litigants vested rights to pursue an appeal."

Szuchy holds "the right to appeal is not a natural or inherent one, but rests upon the statute alone, * * *" (at p. 224). There is no authority in this holding to deny petitioners an appeal which is allowed to all other litigants.

In *National Union, etc.* v. *Arnold*, 348 U. S. 37, 43, 75 S. Ct. 92, 95, this Court held that a statutory review, as here, must be exercised without discrimination.

In *Cochran* v. *Kansas*, 316 U. S. 255, 258, 62 S. Ct. 1068, 1070, this Court held that denial of an appeal allowed others is denial of equal protection of the law, so that respondents' contention (page 5, 1st paragraph) that "An erroneous interpretation of a procedural statute by a State Court * * *" does not give this Court *certiorari* jurisdiction is erroneous when Fourteenth Amendment rights are thereby violated. *Irvin* v. *Dowd*, 359 U. S. 394, 404, 79 S. Ct. 825, 831.[3]

Petitioners have no objection to the procedure followed in *Musser* v. *State of Utah*, 333 U. S. 95, 68 S. Ct. 397 (relied on by respondents), wherein this Court remanded the matter to the State Court for its examination on the constitutional questions presented, should this Court see fit to follow this precedent in the subject proceeding.

CONCLUSION

Wherefore, it is respectfully submitted that nothing in respondents' brief establishes a basis for denial of the peti-

[3] In *Erie* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 822-3, the court proscribed discrimination against non-citizens of a state and held that federal authority may supervise state judicial action if contrary to the Constitution.

tion for a writ of *certiorari*, either on the ground of misdirection of the writ or on the merits of the issues presented in the petition.

It is respectfully submitted that, should this Court deem that error is involved, either in the direction of the writ to the Kings County Supreme Court or the prayer to review the orders of the Court of Appeals rather than the Appellate Division orders, the precedent set forth in *Bartone* v. *United States*, —— U. S. ——, 84 Ct. 21 be followed and that this Court consider the writ, rather than remit petitioners to a new proceeding which would now be time barred, in which event petitioners request leave to supplement the petition and appendix with the necessary Appellate Division record.[4]

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[4] In respect to a possible review of the Appellate Division orders, it is extremely interesting to note the case of *Taca* v. *Rolls Royce, Limited, Rolls Royce, Inc., Capital Airlines, Inc. and United Airlines, Inc.*, decided by the Appellate Division, First Department (a court of co-ordinate jurisdiction with the Appellate Division, Second Department, which made the orders herein), published July 15, 1964, on the front page of the New York Law Journal as an opinion worthy of extra attention by the legal profession, which opinion is set down verbatim below (the decisions of the Appellate Division, Second Department, in the cases at bar were without opinion except for a concurring opinion by BELDOCK, P. J. dealing only with the validity of the assignment of part of petitioner Steingold's causes of action to petitioner Ernest Rassner):

> "Taca International Airlines, S.A., a corporation of El Salvador, plaintiff-appellant, vs. Rolls-Royce of England Limited, a corporation of the United Kingdom, Rolls-Royce, Inc., a corporation of Delaware, Capital Airlines, Inc., a corporation of Delaware and United Airlines, Inc., a corporation of Delaware.
>
> Decided April 9, 1964.

(Continued on following page)

(Footnote continued from preceding page)

"*Per Curiam*—This action seeks recovery for the loss of plaintiff's aircraft as the result of a crash at Managua, Nicaragua. Plaintiff has sued several defendants, among them Rolls-Royce, Ltd., an English corporation. This defendant has moved to set aside the service on it. Service was purportedly made by service on Rolls-Royce, Inc., and Bruce Thomson. There is no question but that these persons were served, the issue being whether such service reached the moving defendant.

Rolls-Royce, Ltd., manufactures and sells motor cars and airplane engines. It also sells parts and gives service to its customers. These products are sold practically world wide and customers can get service at many places. Rolls-Royce, Ltd., owns all the stock of Rolls-Royce of Canada, Ltd., a Canadian corporation, and this company owns all the stock of Rolls-Royce, Inc. The business of Rolls-Royce, Inc., is solely in the sale of products manufactured by Rolls Royce, Ltd., and the servicing of the purchasers of these products. The three mentioned companies have some directors in common, and key executive personnel in Rolls-Royce, Inc., were former executives of either the English or Canadian company and were assigned to their positions by the parent English company. There are frequent conferences among executives of the three companies at which the policies of Rolls-Royce, Inc., are determined. Rolls-Royce, Inc., employees who require technical training are given it by Rolls-Royce, Ltd., in England. All sales literature used by Rolls-Royce, Inc., is written and published by Rolls-Royce, Ltd.

Rolls-Royce, Ltd., gets its income in several ways. It owns no automobiles, and when a sale is made to a customer it buys a car from Rolls-Royce, Ltd., in England and imports it. The sale is at a fixed price which is lower than the price to the ultimate purchaser. Rolls-Royce, Ltd., gives a warranty directly to the purchaser which Rolls-Royce, Inc., delivers with the car. Rolls-Royce, Ltd., pays Rolls-Royce, Inc., a fixed annual fee for services rendered to customers in connection with these warranties. As to airplane engines, the compensation for services is paid by Rolls-Royce of Canada, and this payment is measured by the price of the spare parts sold by Rolls-Royce, Inc.

(Continued on following page)

(Footnote continued from preceding page)

All of the net income of Rolls-Royce, Inc., goes to Rolls-Royce of Canada and appears in that company's balance sheet. As affected by the other operations of the Canadian company it then appears in the balance sheet of Rolls-Royce, Ltd.

The question is whether these facts constitute doing business in this state. Each case necessarily depends on it own facts (Chaplin v. Selznick, 293 N. Y. 529, 533). The fact that a corporation has a subsidiary does not in and of itself bring it within the state or make it amenable to process (Compania Mexicana v. Compania Metropolitana, 250 N. Y. 203). It is otherwise where the subsidiary, though nominally independent, actually functions as a department of the parent (Rabinowitz v. Kaiser-Frazer Corp'n, 198 Misc. 707, aff'd 278 App. Div. 584, aff'd 302 N. Y. 892). And this is not affected by the fact that the subsidiary is given the appearance of being an independent contractor (Goodman v. Pan American World Airways, 1 Misc. 2d 959, Eager, J, aff'd 2 A. D. 2d 707). The facts here are virtually conclusive that any claim of independence on the part of Rolls-Royce, Inc., is illusory. It is clearly a sales agent, despite the forms that would make it appear on the surface to be a purchaser.

We are not unmindful of the decision in Steingold v. Capital Airlines, Inc. (227 N. Y. S. 2d 639, aff'd 19 A. D. 2d 778), where, on similar service, the action was dismissed by this same moving defendant. The decision there was on an entirely different ground, namely, the advisability of entertaining an action by a non-resident against a foreign corporation for an accident occurring outside this state. The court concluded the equities in that case did not warrant exercise of the discretionary power to entertain the action. The question litigated here is entirely different.

The order should be reversed and the motion denied with costs to the appellant."

It will be noted of course, that except for the two Vickers Corporations, the defendants in *Taca* are the respondents in petitions 1-7 herein.

(Continued on following page)

(Footnote continued from preceding page)

In Taca, as in the case at bar, the plaintiff is a non-resident of New York State suing in a New York State Court for causes arising out of an out of state plane crash.

In *Taca,* as in the case at bar, service of process on Rolls-Royce, Ltd., was perfected by serving Rolls-Royce, Inc., as its managing agent.

In *Taca,* as in the case at bar, service on Rolls-Royce, Inc., was made by serving an officer of Rolls-Royce, Inc.

In *Taca,* as in the case at bar, Rolls-Royce, Ltd., moved to vacate service on the ground that service on Rolls-Royce, Inc. was not service on Rolls-Royce Limited.

In *Taca,* as in the case at bar, service was vacated (by New York State Supreme Court at Special Term), on the ground that service on Rolls-Royce, Inc., was not service on Rolls-Royce, Ltd.

At this point, *Taca* and the case at bar show a divergence, as, in the case at bar, the Appellate Division, Second Department, affirmed the dismissal without opinion, while, in *Taca,* the Appellate Division for the First Department reversed the dismissal with new findings that Rolls-Royce, Ltd. was doing business in New York State through and by Rolls-Royce, Inc. and, therefore, serving Rolls-Royce, Ltd., by serving an officer of Rolls-Royce, Inc., was proper and valid service, thus providing a forum in New York State for *Taca* to be heard on its cause of action arising under identical circumstances resulting in petitioner being denied a forum in New York State.

This clearly and adequately demonstrates denial of the equal protection of the law to petitioners herein in violation of the fourteenth amendment.

It is to be noted that, in *Taca,* the Appellate Division distinguishes the Special Term holding in the case at bar on an erroneous ground, stating in regard thereto:

> "* * * the decision there was on an entirely different ground, namely, the advisability of entertaining an action by a non-resident against a foreign corporation for an accident occurring outside this state. The Court concluded the equities in that

(Continued on following page)

(Footnote continued from preceding page)

case did not warrant exercise of the discretionary power to entertain the action. The question litigated here is entirely different."

Special Term's opinion herein clearly shows the above statement to be error, as Special Term said:

"This is a motion by Rolls-Royce, Ltd. The service of the summons was attempted to be made upon one Norman Miller, who, it is claimed by the plaintiff, was an officer of Rolls-Royce, Ltd. The facts submitted in the affidavit of movant indicates clearly that Mr. Norman Miller had nothing to do with Rolls-Royce, Ltd., a British Corporation, but that he was only an employee of Rolls-Royce, Inc., and had no authority to speak for Rolls Royce, Ltd. Consequently the service of the summons and under the circumstances upon him was improper. The purported service of the summons is vacated and set aside. Submit order." (Note: The reference to Miller as an officer of Ltd. is additional error, as Miller was served as an officer of Inc., not Ltd.

The Appellate Division, in *Taca*, may have mistakenly relied on the opinion in Rolls-Royce, Inc.'s dismissal which more adequately fits the said distinguishing remarks in *Taca*.

It would appear, however, that the new findings of the Appellate Division in *Taca* to the effect that Rolls-Royce, Ltd., is doing business in New York through and by its wholly owned subsidiary Rolls-Royce, Inc., supersede the findings to the contrary herein by Special Term, as the *Taca* Court is a higher court of appellate jurisdiction.

The affirmance herein by the Appellate Division, Second Department, without opinion does not constitute an acceptance or adoption of Special Term's findings under New York law (*Estate Property Corporation* v. *Hudson Coal Co.*, 259 A. D. 546 19 N. Y. S. 2d 857, 860, affirmed no opinion 284 N. Y. 722), so that there actually is no conflict between the Appellate Division, First Department and the Appellate Division, Second Department, which are courts of equal and co-ordinate jurisdiction. The conflict is between Special Term's findings in the case at bar and the Appellate Division's findings in *Taca*.

(Continued on following page)

It is further respectfully submitted that, on the merits, the petition ought to be granted and the writ issue to review the determination of the New York State Court of Appeals.

Respectfully submitted,

JACOB RASSNER,
Counsel for Petitioners.

(Footnote continued from preceding page)

Again, as an appeal court of higher jurisdiction, the Appellate Division's findings in *Taca* re this respondent Rolls-Royce, Ltd., must prevail and constitute *res judicata* against respondent Rolls-Royce, Ltd., in accordance with New York Law, as the issues in *Taca* were identical with the issues herein and Rolls-Royce, Ltd., litigated the said issues in *Taca*. *Israel* v. *Wood-Dolson*, 1 N. Y. 2d 116.

APPENDIX E

Copy of Order With Notice of Entry Served By Respondent Rolls-Royce, Inc. (On December 13, 1963)

COURT OF APPEALS

STATE OF NEW YORK

MAURICE STEINGOLD, Executor of the Estate of SAMUEL A. STEINGOLD, Deceased,

Appellant,

—against—

CAPITAL AIRLINES, INC., UNITED AIRLINES, INC., VICKERS-ARMSTRONGS, INC., VICKERS-ARMSTRONGS (AIRCRAFT) LTD., also known as VICKERS-ARMSTRONGS, LTD., ROLLS-ROYCE, INC., and ROLLS-ROYCE, LIMITED,

Respondents.

NOTICE OF ENTRY

MOTION No. 784

SIR:

PLEASE TAKE NOTICE that an order, of which the within is a copy certified by the Clerk of the Court of Appeals, was duly entered herein and filed with the Clerk of the Court of Appeals on the 27th day of November, 1963.

Appendix E

Dated: New York, New York
December 13, 1963

Yours, etc.

GILBERT, SEGALL AND YOUNG
Attorneys for Defendant-Respondent,
Rolls-Royce Inc.
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To:

JACOB RASSNER, ESQ.
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New York, New York 10038

Appendix E

STATE OF NEW YORK,
IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-seventh day of November A. D. 1963.

Present:

HON. CHARLES S. DESMOND,
Chief Judge, presiding.

---

2 Mo. No. 784

MAURICE STEINGOLD, Executor of the Estate of SAMUEL A. STEINGOLD, Deceased,

Appellant,

vs.

CAPITAL AIRLINES, INC., UNITED AIRLINES, INC., VICKERS-ARMSTRONGS, INC., VICKERS-ARMSTRONGS (AIRCRAFT) LTD., a/k/a VICKERS-ARMSTRONGS, LTD., ROLLS-ROYCE, INC., and ROLLS-ROYCE, LIMITED,

Respondents.

Motions having heretofore been made herein upon the part of respondents Vickers-Armstrongs (Aircraft) Ltd. and Rolls-Royce, Inc. to dismiss the appeals taken by the appellant from the orders of the Appellate Division, Second Department, entered July 8, 1963 which affirmed (1) an order of the Supreme Court dated and entered April 6,

1962 granting the motion of defendant Vickers-Armstrongs (Aircraft) Ltd. to vacate the service of the summons upon said defendant and dismissed the complaint as against it, and (2) an order of the Supreme Court dated and entered April 12, 1962 granting the motion of defendant Rolls Royce, Inc. to vacate the service of the summons upon said defendant and dismissed the complaint as against it, and after having heard William J. Junkerman, Esq., in support of said motion and Jacob Rassner, Esq., in opposition thereto, and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motions be and the same hereby are granted and the appeals dismissed upon the ground there is no constitutional question directly involved.

A copy

GEARON KIMBALL
Deputy Clerk

(SEAL)

APPENDIX E

Copy of Order With Notice of Entry Served By Respondent Rolls-Royce, Ltd. (On December 13, 1963)

COURT OF APPEALS
STATE OF NEW YORK

MAURICE STEINGOLD, Executor of the Estate of SAMUEL A. STEINGOLD, Deceased,

Appellant,

—against—

CAPITAL AIRLINES, INC., UNITED AIRLINES, INC., VICKERS-ARMSTRONGS, INC., VICKERS-ARMSTRONGS (AIRCRAFT) LTD., also known as VICKERS-ARMSTRONGS, LTD., ROLLS-ROYCE, INC., and ROLLS-ROYCE, LIMITED,

Respondents.

NOTICE OF ENTRY

MOTION No. 784

SIR:

PLEASE TAKE NOTICE that an order, of which the within is a copy certified by the Clerk of the Court of Appeals, was duly entered herein and filed with the Clerk of the Court of Appeals on the 27th day of November, 1963.

Appendix E

Dated: New York, New York
December 13, 1963

Yours, etc.

GILBERT, SEGALL AND YOUNG
Attorneys appearing specially for
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To:

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Appendix E

STATE OF NEW YORK,
IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-seventh day of November A. D. 1963.

Present:

HON. CHARLES S. DESMOND,
Chief Judge, presiding.

---

2 Mo. No. 784

MAURICE STEINGOLD, Executor of the Estate of SAMUEL A. STEINGOLD, Deceased,

Appellant,

vs.

CAPITAL AIRLINES, INC., UNITED AIRLINES, INC., VICKERS-ARMSTRONGS, INC., VICKERS-ARMSTRONGS (AIRCRAFT) LTD., a/k/a VICKERS-ARMSTRONGS, LTD., ROLLS-ROYCE, INC., and ROLLS-ROYCE, LIMITED,

Respondents.

A motion having heretofore been made herein upon the part of the respondent Rolls-Royce Limited to dismiss the appeal taken by the appellant from the order of the Appellate Division, Second Department, entered July 8, 1963 which affirmed an order of the Supreme Court made and entered April 12, 1962 granting the motion of defendant

Appendix E

Rolls-Royce, Limited, to vacate the service of the summons upon it, and after having heard William J. Junkerman, Esq., in support of said motion and Jacob Rassner, Esq., in opposition thereto and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed for non-finality.

A copy

GEARON KIMBALL
Deputy Clerk

(SEAL)

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Office-Supreme Court, U.S.
FILED
SEP 14 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1964

No. 133

MAURICE STEINGOLD, Executor of the Estate of SAMUEL A. STEINGOLD, deceased,

Petitioner,

—against—

CAPITAL AIRLINES, INC., UNITED AIRLINES, INC., VICKERS-ARMSTRONGS, INC., VICKERS-ARMSTRONGS (AIRCRAFT) LTD., Also known as VICKERS-ARMSTRONGS LTD., ROLLS-ROYCE, INC., and ROLLS-ROYCE, LTD.,

Respondents.

[Petitions Nos. 1, 3, 4, 5]

ERNEST RASSNER, As Assignee of MAURICE STEINGOLD, Executor of the Estate of SAMUEL A. STEINGOLD, deceased,

Petitioner,

—against—

The above-named respondents,

Respondents.

[Petition No. 2]

BRIEF FOR RESPONDENTS CAPITAL AIRLINES, INC., UNITED AIR LINES, INC., VICKERS-ARMSTRONGS INCORPORATED, and VICKERS-ARMSTRONGS (AIRCRAFT) LIMITED, IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

WILLIAM J. JUNKERMAN,
Counsel for Respondents Capital Airlines, Inc., United Air Lines, Inc., Vickers-Armstrongs Incorporated, and Vickers-Armstrongs (Aircraft) Limited,
80 Broad Street,
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DIgby 4-6800

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IN THE

Supreme Court of the United States

OCTOBER TERM 1964

No. 133

MAURICE STEINGOLD, Executor of the Estate of SAMUEL A. STEINGOLD, deceased,

Petitioner,

—against—

CAPITAL AIRLINES, INC., UNITED AIRLINES, INC., VICKERS-ARMSTRONGS, INC., VICKERS-ARMSTRONGS (AIRCRAFT) LTD., Also known as VICKERS-ARMSTRONGS LTD., ROLLS-ROYCE, INC., and ROLLS-ROYCE, LTD.,

Respondents.

[Petitions Nos. 1, 3, 4, 5]

ERNEST RASSNER, As Assignee of MAURICE STEINGOLD, Executor of the Estate of SAMUEL A. STEINGOLD, deceased,

Petitioner,

—against—

The above-named respondents,

Respondents.

[Petition No. 2]

BRIEF FOR RESPONDENTS CAPITAL AIRLINES, INC., UNITED AIR LINES, INC., VICKERS-ARMSTRONGS INCORPORATED, and VICKERS-ARMSTRONGS (AIRCRAFT) LIMITED, IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

Opinions Below

Petition No. 1—The order of the Supreme Court of the State of New York, County of Kings, denying petitioner

Steingold's motion for an order joining his assignee as a party plaintiff was entered without opinion. The unanimous affirmance by the Appellate Division, Second Department, one justice concurring in the result with a separate memorandum, is reported in 19 AD 2d 752, 242 N.Y.S. 2d 1021, and the concurring opinion is also printed in Appendix C to the petition herein at page 17. The denial by the Appellate Division of petitioner's motion for leave to appeal to the Court of Appeals is not officially reported but a memorandum thereof was published in the New York Law Journal on September 25, 1963, at page 12. Petitioner's appeal to the Court of Appeals on alleged constitutional grounds was dismissed on November 27, 1963, 13 NY 2d 1060, 246 N.Y.S. 2d 39. The Court of Appeals' subsequent dismissal of petitioner's motion for leave to appeal, upon the ground that it was not made within the time required by statute, is reported in 14 NY 2d 548, 248 N.Y.S. 2d 647, and is also printed as Appendix A to this brief.*

---

* In an attempt to bring some degree of order to the chaotic state of the petitions herein, unnecessarily created by petitioners' treatment of separate orders and judgments in a single case as separate cases, the following table, relating the individual petitions to petitioners' motions in the Court of Appeals of the State of New York, the denials of which are sought to be reviewed, is respectfully submitted (See, 14 NY 2d 548, reprinted as Appendix A to this brief):

Motion	Petition No.
A(1)	1
A(2)	2
B	7
C	3
D	6
E	4
F	5

This answering brief is addressed to Petitions Nos. 1, 2, 3, 4, and 5.

Petition No. 2—The order of the Appellate Division denying petitioner Rassner's motion for leave to intervene is not officially reported, nor is the denial by that court of said petitioner's motion for leave to appeal to the Court of Appeals. Petitioner's appeal to the Court of Appeals on alleged constitutional grounds was dismissed on November 27, 1963, 13 NY 2d 1062. The Court of Appeals' subsequent dismissal of petitioner's motion for leave to appeal, upon the ground that it was not made within the time required by statute, is reported in 14 NY 2d 548, 248 N.Y.S. 2d 647, and is also printed as Appendix A to this brief.

Petition No. 3—The opinion of the Supreme Court of the State of New York, Kings County, granting judgment dismissing the complaint as to respondents Capital Airlines, Inc., and United Air Lines, Inc., is not officially reported but is printed in Appendix D to the petition herein at page 20. The affirmance of that dismissal by the Appellate Division, Second Department, is reported in 19 AD 2d 778, 242 N.Y.S. 2d 1022. The denial by the Appellate Division of petitioner Steingold's motion for leave to appeal to the Court of Appeals is not officially reported but a memorandum thereof was published in the New York Law Journal on September 25, 1963, at page 12. Petitioner's appeal to the Court of Appeals on alleged constitutional grounds was dismissed on November 27, 1963, 13 NY 2d 1062. The subsequent dismissal of petitioner's motion for leave to appeal, upon the ground that it was not made within the time required by statute, is reported in 14 NY 2d 548, 248 N.Y.S. 2d 647, and is also printed as Appendix A to this brief.

Petition No. 4—The opinion of the Supreme Court of the State of New York, Kings County, granting judgment dismissing the complaint as to respondent Vickers-Armstrongs Incorporated is not officially reported but is

printed in Appendix D to the petition herein at page 21. The affirmance of that dismissal by the Appellate Division, Second Department, is reported in 19 AD 2d 778, 242 N.Y.S. 2d 1018. The denial by the Appellate Division of petitioner Steingold's motion for leave to appeal to the Court of Appeals is not officially reported but a memorandum thereof was published in the New York Law Journal on September 25, 1963, at page 12. Petitioner's appeal to the Court of Appeals on alleged constitutional grounds was dismissed on November 27, 1963, 13 NY 2d 1062. The Court of Appeals' subsequent dismissal of petitioner's motion for leave to appeal, upon the ground that it was not made within the time required by statute, is reported in 14 NY 2d 548, 248 N.Y.S. 2d 647, and is also printed as Appendix A to this brief.

Petition No. 5—The opinion of the Supreme Court of the State of New York, Kings County, setting aside and vacating the service of the summons and dismissing the complaint as to respondent Vickers-Armstrongs (Aircraft) Limited is not officially reported but is printed in Appendix D to the petition herein at page 21. The affirmance of that order and the judgment entered thereon, by the Appellate Division, Second Department, is reported in 19 AD 2d 778, 242 N.Y.S. 2d 1020. The denial by the Appellate Division of petitioner Steingold's motion for leave to appeal to the Court of Appeals is not officially reported but a memorandum thereof was published in the New York Law Journal on September 25, 1963, at page 16. Petitioner's appeal to the Court of Appeals on alleged constitutional grounds was dismissed on November 27, 1963, 13 NY 2d 1062. The Court of Appeals' subsequent dismissal of petitioner's motion for leave to appeal, upon the ground that it was not made within the time required by statute, is reported in 14 NY 2d 548, 248 N.Y.S. 2d 647, and is also printed as Appendix A to this brief.

The Question Presented

The sole question presented by the various petitions is whether this Court should review orders of the Court of Appeals of the State of New York dismissing petitioners' motions for leave to appeal to that court on the ground that they were not made within the time required by a New York state statute after the Court of Appeals had heard oral argument and dismissed petitioners' previous appeals, allegedly taken as of right, upon the ground that no constitutional question was directly involved.

Statement

This action was instituted in the Supreme Court of the State of New York, County of Kings, by petitioner Maurice Steingold, a Virginia executor, to recover damages for the alleged wrongful death of Samuel A. Steingold, a Virginia resident, as a result of an airplane accident near Charles City, Virginia, on January 18, 1960. The flight involved originated in Chicago, Illinois, and was en route from Washington National Airport in Arlington, Virginia, to Norfolk, Virginia, at the time of the crash. Neither the flight nor the decedent had any contact with New York State. Before, and at the time of, commencing this action in New York State, petitioner Steingold had commenced and was actively prosecuting an action in the United States District Court for the Eastern District of Virginia against the same defendants as in the present action, based precisely upon the same facts as those in this action. (Pet., App. D., 18-19, 21.) That action is still pending and has not yet come to trial in the district court in Virginia.

Respondents Capital Airlines, Inc., and United Air Lines, Inc., are corporations doing business in the state of New York. Upon motion by said respondents, the complaint was dismissed as against them under the doctrine of *forum non conveniens* and upon the ground that the court had no jurisdiction of the subject matter of the action. (Pet., App. D., 20.)

Respondent Vickers-Armstrongs Incorporated is a Delaware corporation which had filed a certificate to do business in New York State. Upon motion by said respondent made after answer, the complaint was dismissed as to it in the exercise of the court's discretion under the doctrine of *forum non conveniens*. (Pet., App. D., 21-23.)

Prior to the dismissal of the complaint as against respondent Vickers-Armstrongs Incorporated, petitioner Steingold moved to add petitioner Ernest Rassner, as his assignee, as a party plaintiff in the action. Petitioner Ernest Rassner is an attorney associated with the firm of Rassner & Rassner, as is Jacob Rassner, counsel for petitioners herein. (Martindale-Hubbell Law Directory, 1964 ed., 2469.) Said motion was denied without opinion.

Respondent Vickers-Armstrongs (Aircraft) Limited* is a British corporation and service of the summons in this action was attempted to be made upon it by service upon the secretary-stenographer of one Christopher Clarkson, neither of whom was employed by or an agent of said respondent at that time. Upon motion by respondent Vickers-Armstrongs (Aircraft) Limited, service of the

---

* Vickers-Armstrongs (Aircraft) Limited was never known as Vickers-Armstrongs, Ltd., as alleged in the summons and complaint; on the contrary, Vickers-Armstrongs Limited is and was an entirely separate and distinct British corporation.

summons was set aside and vacated and the action was dismissed as against it. (Pet., App. D., 21.)

Petitioner Steingold appealed to the New York Supreme Court, Appellate Division, Second Department, from the orders and judgments entered on the foregoing determinations of the lower court and the Appellate Division unanimously affirmed each such order and judgment. While said appeals were pending, petitioner Rassner, as purported assignee of petitioner Steingold, made a new motion in the Appellate Division for leave to intervene and be joined or substituted as party plaintiff in the action. This motion was also unanimously denied by the Appellate Division.

Petitioners then made separate motions in the Appellate Division for leave to appeal to the New York Court of Appeals from each of the aforesaid determinations by the Appellate Division and these motions were also denied. Thereafter, petitioners attempted to appeal as of right to the Court of Appeals, "on the ground that the construction of the Constitution of the United States is directly involved." Respondents then moved in the Court of Appeals to dismiss the said appeals and on November 27, 1963, all of the appeals were dismissed by the Court of Appeals "upon the ground there is no constitutional question directly involved," except in the case of the appeal from the affirmance of the order denying petitioner Steingold's motion to join his assignee as a party plaintiff, which appeal was dismissed "upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution."

Thereafter, by notices of motion dated January 10, 1964, forty-four days after the dismissals of respondents' appeals "as of right" by the Court of Appeals, petitioner

Steingold moved that court for leave to appeal from the orders of affirmance of the Appellate Division and petitioner Rassner moved for leave to appeal from the order of the Appellate Division denying his motion in that court for leave to intervene. By orders dated February 20, 1964, the Court of Appeals dismissed each motion for leave to appeal, "upon the ground that it was not made within the time required by statute."

ARGUMENT

I

Under frequently repeated holdings of this Court, it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when federal rights are allegedly in controversy than when the case turns entirely on questions of local or general law. *Wolfe* v. *North Carolina*, 364 U.S. 177, 195 (1960); *John* v. *Paullin*, 231 U.S. 583, 585 (1913); *Chesapeake & Ohio Ry. Co.* v. *McDonald*, 214 U.S. 191, 195 (1909); *Newman* v. *Gates*, 204 U.S. 89, 95 (1907).

Here, petitioners' motions for leave to appeal to the New York Court of Appeals were dismissed "upon the ground that they were not made within the time required by statute." 14 NY 2d 550. Thus, the orders of dismissal, of which review is sought herein, were neither a deprivation of due process nor a denial of the equal protection of the law. Moreover, as petitioners, themselves, readily admit, the federal question allegedly involved "has not heretofore been raised, as the said dismissals were the last proceedings in the subject litigation." (Pet. 7.) As this Court has previously suggested, such a defect might

have been cured by a timely motion for a rehearing in the New York Court of Appeals, but petitioners failed to avail themselves of this procedure. *Brinkerhoff-Faris Co.* v. *Hill*, 281 U.S. 673, 677-78 (1930).

In *Atlantic Coast Line R.R. Co.* v. *Mims*, 242 U.S. 532 (1917), this Court said (p. 535):

> "To become the basis of a proceeding in error from this court to the Supreme Court of a State 'a right, privilege or immunity' claimed under a statute of the United States must be 'especially set up or claimed,' and must be denied by the state court. Rev. Stats., §709; Judicial Code §237. This means that the claim must be asserted at the proper time and in the proper manner by pleading, motion or other appropriate action under the state system of pleading and practice, *Mutual Life Insurance Co.* v. *McGrew*, 188 U.S. 291, 308, and upon the question whether or not such a claim has been so asserted the decision of the state court is binding upon this court, when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion for the purpose of defeating the claim of federal right. *Central Vermont Railway Co.* v. *White*, 238 U.S. 507; *John, Guardian,* v. *Paullin*, 231 U.S. 583; *Erie R.R. Co.* v. *Purdy*, 185 U.S. 148; *Layton* v. *Missouri*, 187 U.S. 356."

II

Petitioners not only seek to becloud the issues and rewrite the New York statutes, but also they flatly misstate respondents' contentions before the New York Court of Appeals. Under CPLR 5514 (a), if the appellants, petitioners here, err in the method of taking an appeal or of seeking permission to appeal, the date of dismissal or denial of permission becomes the starting point for com-

puting the thirty-day period specified in CPLR 5513 within which to pursue the proper path. Petitioners' remarks at page 7 of their petition to the contrary notwithstanding, CPLR 5514 (a) does not set the starting point as the date of service of a copy of the order dismissing the appeal erroneously taken as of right; rather it plainly and simply states that "the time limited for such other method shall be computed from the dismissal or denial * * *."

Moreover, petitioners' statement at page 8 of their brief, wherein they assert that respondents contended that the motions for leave to appeal before the Court of Appeals were not timely because not taken within thirty days after service of copies of the orders of the Appellate Division affirming the Supreme Court, is patently and demonstrably false and was neither the basis for the Court of Appeals dismissal of their motions nor the contention of respondents in the court below. In each brief filed in the Court of Appeals on behalf of the present respondents, the following statement was made*:

> "Appellant's appeal to this Court as of right was dismissed by the unanimous order of this Court entered November 27, 1963, and such order did not grant an extension of time within the language of Section 5514. Since a motion for permission to appeal must be made within thirty days of dismissal, the last day for making such a motion was December 27, 1963, and appellant's present motion is not timely."

That it was petitioners' failure to move within thirty days after the dismissal by the Court of Appeals of their

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* Motions A(1)(2)—Capital and United Brief, p. 4
Vickers Brief, p. 4
Motion C —Capital and United Brief, p. 5
Motion E —Vickers Brief, p. 6
Motion F —Vickers Brief, p. 6.

appeals taken as of right, rather than within thirty days after service of a copy of the orders of affirmance of the Appellate Division, as petitioners erroneously imply, is amply demonstrated in the memorandum of the Court of Appeals reported in 14 NY 2d 548, and printed as Appendix A to this brief.

Furthermore, it should be noted that, contrary to petitioners' statements at pages 6 and 7 of their petition, the provisions of CPLR 5514 (a), extending the time to pursue an alernative method of appeal or to seek permission to appeal, are neither new in the procedural law of New York nor were they enacted to eliminate any of the imaginary injustices or traps envisioned by petitioners. Prior to September 1, 1963, the effective date of the Civil Practice Law and Rules, L. 1962, ch. 308, the New York Civil Practice Act provided that an application for permission to appeal could be made following dismissal of appeals taken as of right; "by applying to the court of appeals within thirty days after entry of the order dimissing the appeal." CPA §592 (5) (b) (ii). Thus, the starting point for the thirty-day period within which to pursue an alternative method of appeal under the CPLR is precisely the same as it was under the CPA, and the New York Court of Appeals held almost ten years ago that a motion for leave to appeal served more than thirty days after the dismissal of an appeal taken on alleged constitutional grounds, was not timely made and must be dismissed. *City of New Rochelle* v. *Stevens*, 307 N.Y. 832, 128 N.Y.S. 2d 243 (1954).

It is noteworthy that petitioners do not assert that there was any delay in their receipt of notification of the Court of Appeals decisions of November 27, 1963. They hardly could do so since the clerk of that Court, pursuant to time honored practice, notified all parties to the litigation of the decisions, by telegram, as soon as they were handed down.

Finally, this Court has held that otherwise available rights may be waived if the rules set forth under state procedure are not followed. *Central Union Co.* v. *Edwardsville*, 269 U.S. 190 (1925); *Chesapeake & Ohio Ry. Co.* v. *McDonald*, 214 U.S. 191 (1909). In effect, such failure to correctly exhaust available state procedure results in orders which are not "final judgments or decrees rendered by the highest court of a state in which a decision could be had", 28 U.S.C. §1257; cf. *Hammerstein* v. *Superior Court*, 341 U.S. 491 (1951). This Court's opinion in *John* v. *Paullin*, 231 U.S. 583 (1913), further clarifies this point (p. 585):

> "As the Supreme Court of the State did not pass upon the merits of the case or upon the correctness of any of the rulings below, but, on the contrary, held that it was powerless to do so because its appellate jurisdiction was not invoked in accordance with the laws of the State, we do not perceive any theory upon which its judgment of dismissal may be reviewed by us consistently with the familiar limitations upon our authority. See Rev. Stat., §709; Judicial Code, §237. Certainly no Federal right was denied by that court, and if, as was held by it, its appellate jurisdiction was not properly invoked, no Federal question was before it for decision."

III

It will be noted that the petitions do not question the correctness of the basic decisions of the courts below. The reason, of course, is obvious, since the determinations of the New York courts were not only correct, but also were based upon independent non-federal grounds. Clearly, a state court has the right to exercise its discretion not to accept jurisdiction of foreign tort actions

involving non-residents. This is precisely the position taken by the New York courts with respect to respondents Capital Airlines, Inc., and United Air Lines, Inc., in petition No. 3, and respondent Vickers-Armstrongs Incorporated in petition No. 4, and is in accord with long established state law, *Williams* v. *Seaboard Air Line R.R. Co.*, 9 AD 2d 268, 193 N.Y.S. 2d 588 (1959); *Winters* v. *General Tire & Rubber Co.*, 13 AD 2d 470 (1961).

It is equally clear that a state may prescribe the basis for jurisdiction over foreign corporations and the method whereby service of process must be accomplished in order to commence an action in its own courts. Thus, the dismissal of the action as against respondent Vickers-Armstrongs (Aircraft) Limited in petition No. 5 was based upon non-federal grounds, to wit, improper service of the summons, and is also in accord with established state law. *Tauza* v. *Susquehanna Coal Co.*, 220 N.Y. 259, 159 N.Y. Supp. 1145 (1917); *Simonson* v. *International Bank*, 16 AD 2d 55, 225 N.Y.S. 2d 392 (1962).

Further, the denial of petitioner Steingold's motion for an order joining his assignee as a party plaintiff in petition No. 1, and the denial of petitioner Rassner's motion for an order to intervene as assignee in petition No. 2, were both based upon the non-federal ground of non-assignability of the cause of action for wrongful death or right to sue and are fully in accord with the established law of both New York and Virginia. N. Y. Personal Property Law §41 (1); *Rice* v. *Postal-Telegraph-Cable Co.*, 174 App. Div. 39, 160 N.Y. Supp. 172 (1916); *City of Richmond* v. *Hanes*, 203 Va. 102, 122 S.E. 2d 895 (1961).

The New York Court of Appeals reviewed all five of these orders of the lower courts and dismissed petitioners' appeals taken "as of right" on the ground that the order sought to be appealed from did not finally determine the

action within the meaning of the constitution in petition No. 1, and that no constitutional questions were directly involved in petitions Nos. 2, 3, 4 and 5. 13 NY 2d 1060, 1062. It is therefore abundantly clear that the Court of Appeals found that the lower court orders were based upon independent non-federal grounds.

In *Murdock* v. *City of Memphis*, 87 U.S. 590, 634-36 (1874), this Court decided that it would not review state court decisions which rest on independent and adequate state grounds. The decisions reinforcing and applying this principle are legion, as well as recent. Cf. *Fay* v. *Noia*, 372 U.S. 391, 428-29 (1963); *Wilson* v. *Loew's Inc.*, 355 U.S. 597 (1958); *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210 (1935). This Court's opinion in *Lynch* v. *New York*, 293 U.S. 52 (1934), explained the application of the principle, as follows (pp. 54-55):

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. • • • Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. • • •"

CONCLUSION

The Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

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United Air Lines, Inc.,
Vickers-Armstrongs Incorporated, and
Vickers-Armstrongs (Aircraft) Limited.

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APPENDIX A

COURT OF APPEALS

STATE OF NEW YORK

MAURICE STEINGOLD, as Executor of SAMUEL A. STEINGOLD, Deceased,
Appellant,

v.

CAPITAL AIRLINES, INC., et al.,
Respondents.

Submitted January 20, 1964; decided February 20, 1964.

(A) MOTION for leave to appeal from (1) an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered July 8, 1963, which unanimously affirmed an order of the Supreme Court at Special Term (MILES F. MCDONALD, *J.*), entered in Kings County, denying a motion by plaintiff for an order joining his assignee as a party plaintiff, and (2) an order of said Appellate Division, entered March 25, 1963, which denied a motion by plaintiff's assignee to intervene. (B) MOTION for leave to appeal from an order of said Appellate Division, entered July 8, 1963, which unanimously affirmed an order of the Supreme Court at Special Term (ANTHONY J. DI GIOVANNA, *J.*), entered in Kings County, setting aside and vacating the service of the summons upon defendant Rolls-Royce, Ltd. (C) MOTION for leave to appeal from an order of said Appellate Division, entered July 8, 1963, which unanimously affirmed an order of the Supreme Court at Special Term (ANTHONY J. DI GIOVANNA, *J.*), entered in Kings County, dismissing the complaint as to defendants Capital Airlines, Inc., and United Airlines, Inc. (D) MOTION for leave to appeal from an order of said Appellate Divi-

sion, entered July 8, 1963, which unanimously affirmed an order of the Supreme Court at Special Term (ANTHONY J. DI GIOVANNA, *J.*; opinion 34 Misc 2d 33), entered in Kings County, quashing service of process and dismissing the complaint as to defendant Rolls-Royce, Inc. (E) MOTION for leave to appeal from an order of said Appellate Division, entered July 8, 1963, which unanimously affirmed a judgment of the Supreme Court, entered upon an order of the court at Special Term (JAMES S. BROWN, JR., *J.*), entered in Kings County, dismissing the complaint as to defendant Vickers-Armstrongs, Inc. (F) MOTION for leave to appeal from an order of said Appellate Division, entered July 8, 1963, which unanimously affirmed an order of the Supreme Court at Special Term (ANTHONY J. DI GIOVANNA, *J.*), entered in Kings County, setting aside and vacating the service of the summons and dismissing the complaint as to defendant Vickers-Armstrongs (Aircraft) Ltd. On November 27, 1963 the Court of Appeals dismissed appeals taken as of right from all of the foregoing orders of the Appellate Division which were entered on July 8, 1963 (see 13 N Y 2d 1060, 1062). The notices of all the foregoing motions, (A) through (F), were dated January 10, 1964.

Jacob Rassner for motions (A) through (F).

Edward J. Behrens and Charles H. Lawson opposed to motions (A) and (C).

William J. Junkerman, James B. McQuillan and Carroll E. Dubuc opposed to motions (A), (E) and (F).

John C. Lankenau opposed to motions (A), (B) and (D).

Motions (A) through (F) dismissed upon the ground that they were not made within the time required by statute. (Motions [A] and [C] dismissed, with $10 costs; motions [E] and [F] dismissed, with $10 costs and necessary printing disbursements.)